SINGAPORE.

[APPELLATE CIVIL JURISDICTION]

S. MUTHUCUMARU .. .. Plaintiff

vs.

ALKAFF & CO. .. .. .. Defendants

[SINGAPORE SUITS No. 157 of 1927 and No. 95 of 1929 CONSOLIDATED]

Appeal to the Court of Appeal—Civil Procedure Code, Sections 1127, 1146 and 1150.

A single Judge has no jurisdiction to make an Order extending the time within which to give notice of appeal.

This matter came before the Court of Appeal (Sproule, J., Thorne, J. and Stevens, J.) by way of appeal from the Judgment of Murison, C.J. The Judgments on the substantial questions involved in the Appeal are not of general interest. Preliminary to the hearing of the substantive appeal, cross motions were filed on each side. The substance and circumstances of these motions and the facts and arguments adduced sufficiently appear from the judgments of the Court of Appeal.

Knowles for the Plaintiff.

Page and *Stevens* for the Defendants.

Cur. Ad. Vult.

SPROULE, J.—Judgment in the consolidated suits was delivered on 1st June, 1929. *Inter alia* an account was referred to the Registrar in case counsel could not come to an agreement. Negotiations between counsel and other matters distracted the Defendant's attention and when agreement appeared unlikely, he gave notice of appeal on 4th July, 1929.

If the judgment had been interlocutory, then notice should have been given within twenty-one days of 1st June, and the notice of 4th July, since it did not comply with section 1127 of the Civil Procedure Code, was a nullity and ineffective for the inception of an appeal.

It appears that Defendant wished to appeal only against the footing of countersignature upon which the account was ordered, and it may be that he was therefore justified in believing that the judgment he desired to appeal against was interlocutory.

Be that as it may, Defendant filed a motion dated 10th July, 1929, asking for extension of time to appeal from 21st June, 1929, to 5th July, 1929, hoping no doubt for an order *nunc pro tunc* to cure this invalid notice of 4th July.

Directly upon receipt of notice of this motion, Plaintiff was advised to file a motion by way of counterblast, asking that the appeal upon which notice was given on 4th July, might be struck out for non-compliance with section 1127. This motion was dated 11th July, 1929. It was a highly unnecessary proceeding, since Plaintiff could have achieved the same end by opposing Defendant's motion for extension of time.

Both motions were properly headed "In the Court of Appeal." Both were listed for hearing before Deane, J. on 23rd July, 1929, after affidavits had been filed under Defendant's application by Mr. Page and Mr. Knowles, the Defendant's and Plaintiff's counsel.

Deane, J. purporting to act under section 1150 of the Code as the Court of Appeal operating through a single Judge, dealt with Defendant's motion for extension of time to appeal. He heard counsel on both sides and decided to allow the motion, making Defendant pay the costs of this indulgence granted to him.

Mr. Knowles' motion was then called on, but the learned Counsel refused to move, saying that his application was to the Court of Appeal, and questioning the learned Judge's jurisdiction to deal with it as a single Judge. Deane, J. thereupon dismissed this motion with costs.

Plaintiff was not satisfied with either order. But I think he misconceived his remedy. He appealed to the Court of Appeal against the two orders of the Court of Appeal (purporting to operate through a single Judge). Mr. Knowles before us did not support that procedure. He had already, in effect, abandoned it when he moved the Court of Appeal by a motion dated 12th November, 1929, to act under section 1150 (3) and discharge the two orders he complained of.

Out of all this very confused proceedings two issues arise upon merits, as distinct from mere procedure. These appear to be

(*a*) whether Deane, J. had jurisdiction under section 1150 to make the two orders he did,

(*b*) whether, if he had not, we should not, ourselves, deal with the application by Defendants for extension of time to appeal upon its merits.

Upon the first point we are all agreed that Deane, J. had no jurisdiction. The jurisdiction conferred upon a single Judge by section 1150 of the Code is subject to certain clear limitations—

(*a*) There must be a cause or matter pending before the Court of Appeal.

(*b*) Any direction to be given by the single Judge must not involve the decision of the Appeal

(*c*) Any such direction must be incidental to a pending cause or matter

(*d*) Only an interim order can be made to prevent prejudice to claims of parties to an appeal, which, moreover, must be pending.

Now if notice of appeal is not given which satisfies the requisites of section 1127, then there is no inception of any appeal and there is not and cannot be an appeal pending or any cause or matter pending, before the Court of Appeal. The essential condition or at any rate one essential, of (*a*), (*b*), (*c*) and (*d*) was therefore never satisfied, and Deane, J. had no jurisdiction, under section 1150 to grant or refuse extension of time or strike out or refuse to strike out an appeal which did not exist.

There are other objections to the jurisdiction, which I refer to shortly before leaving the matter. That a grant of extension of time to appeal is neither merely an incidental nor merely an interim matter can be understood best by considering the result of a refusal to extend time. Again, if parties can (and indeed should and must) come direct to the full Court of Appeal for an extension of time to appeal, the single Judge, even if he has jurisdiction *aliter* (which he has not) will in no way prevent prejudice to the intending applicant by giving him an extension in the meantime.

Deane, J's. two orders, and the incidental order for costs in defendant's favour therefore, were wrong and must be set aside.

As to the merits of Defendant's application for an extension of time we have already ruled that he should be given this extension.

There remains the question of costs. Of the Plaintiff's appeal and motion, one was misconceived, the other successful, so I think there should be no order as to the costs of either.

There remains only the question of the costs which Defendant should pay in respect of the indulgence we have given him of an extension of time to appeal.

We have conferred with Counsel and learn that the costs awarded by Deane, J. to be paid by Defendant in respect of the indulgence he received have actually been taxed and paid. Those costs should properly be refunded in consequence of our judgment. But Mr. Page is willing that they should be retained by Plaintiff and Mr. Knowles is willing to accept and retain that sum, as the proper measure of the costs of the indulgence we have now given to Defendants by enlarging upon our own motion the time for appealing, and we approve of that course.

THORNE, J.—The judgment in this Suit which is dated the 20th day of June, 1929, ordered that the Defendants on their counterclaim recover against the Plaintiff so much of two sums therein mentioned as might be agreed to have been countersigned by the Plaintiff on the relative invoices and failing agreement of Counsel as to the amount the matter was referred to the Registrar to certify the figure. This Judgment was delivered on the 1st day of June, 1929.

The Defendants gave notice of appeal dated the 4th day of July, 1929, and served the following day.

Thinking this notice out of time the Defendants gave notice of motion for the 15th day of July, to extend the time for appealing to the 5th July.

The Plaintiff gave notice the next day that he would move the same day for an order that the Appeal be struck out as being out of time.

Both motions were entitled in the Court of Appeal. The Defendants moved on the 15th July, before Deane, J. who acting in purported exercise of the powers conferred by section 1150 of the Civil Procedure Code made an order extending the time from the 21st June to the 5th July, 1929, and ordered the costs of the motion to be taxed and paid by the Defendants.

The learned Judge then asked Counsel for the Plaintiff if he moved and was informed that Counsel entertained doubts as to the powers of a single Judge to deal with the matter and he did not move. An order was then made dismissing this motion but no order was made as to costs.

The Plaintiff preferred this Appeal.

On the 12th November, 1929, the Plaintiff gave notice that he would move the Court of Appeal for an order that the order of Deane, J. of 23rd July extending the time for appealing be discharged.

This motion and the Appeal came on together.

I have set out these facts in full in order that the somewhat involved procedure adopted may be understood.

The Plaintiff's motion to strike out the Defendants' appeal was misconceived. In the first place if the Appeal was out of time it was not extant and there was nothing to strike out. In the next place it was unnecessary as either the Defendants' motion must succeed or fail,—if the former the Appeal would cease to be out of time, and if the latter there ceased to be any Appeal.

The Plaintiff should have contented himself with opposing the Defendants' motion.

The Plaintiff's Appeal is equally misconceived and his Counsel realising this filed his motion of 12th November for an order under section 1150 (3) of the Civil Procedure Code that the order of Deane, J. be discharged.

This in my view was correct practice.

At the hearing we thought that the Defendants had made out a case for the indulgence of extension of time and made the necessary order which disposes of the matter, but in order that the future practice may be established it is desirable that this Court should rule upon the questions of practice which arise.

First, as to the Defendants' motion to extend the time for appealing.

Section 1150 of the Civil Procedure Code is as follows:—

(1) In any cause or matter pending before the Court of Appeal any direction incidental thereto, not involving the decision of the Appeal, and any interim order to prevent prejudice to the claims of the parties pending the appeal may, if the Court of Appeal is not sitting, be made by a single Judge.

(2) Every application under this section shall be made by motion, and shall be entitled "In the Court of Appeal."

(3) Every order so made may be discharged or varied by the Court of Appeal.

In my opinion Deane, J. had no jurisdiction to make an order extending the time within which to give notice of appeal.

The giving of such a notice is the inaugural step to Appeal and in order to complete the commencement of an Appeal notice must be given in strict compliance with the provisions of section 1127 of the Civil Procedure Code.

The very reason for the Defendants' motion was that they had not given the notice and the effect of the order extending time was to bring into existence an Appeal, to create that which but for the order did not exist.

The powers of a single judge are strictly limited to dealing with incidental matters which arise in a cause or matter pending before the Court of Appeal and here in my opinion nothing was so pending.

Equally as the making of the order brought the Appeal into existence so the refusal of an order would put an end to the Defendants preferring an Appeal and so cannot well be said to be an order which was incidental and did not involve the decision of the Appeal.

Both the orders of Deane, J. were wrong and must be set aside.

Secondly, as to the Plaintiff's Appeal.

This was clearly misconceived; the proper procedure for bringing in question an order made by a single Judge under the powers conferred by section 1150 of the Civil Procedure Code is to apply to the Court of Appeal under the provisions of sub-section 3 of that section. The Appeal must therefore stand dismissed.

As to the costs.

The Plaintiff's Appeal has failed and his motion succeeded and the proper order is, I think to make no order as to the costs of either.

The costs of the Defendants' motion before Deane, J. have been taxed and paid by the Defendants to the Plaintiff. We granted the Defendants an indulgence by extending his time for appealing, and he should pay the costs of obtaining that indulgence.

In order to avoid the trouble and expense of taxation we saw Counsel for both parties in Chambers, after the hearing of the Appeal, and they then agreed that instead of a refund being made and a fresh taxation being had the amount already paid by the Defendants to the Plaintiff (*i.e.*, the total of the costs taxed under the Order of Deane, J.) should be retained by the Plaintiff in satisfaction of his costs of the indulgence granted by this Court to the Defendants. In the result then the only order as to costs will be such as is necessary to record approval of this eminently sensible plan.

STEVENS, J.—This motion and appeal involved the question whether a single Judge sitting as a Court of Appeal and acting under the powers conferred on him by section 1150 (1) of the Civil Procedure Code has power to enlarge the time appointed by the Code for bringing an appeal from the Supreme Court in the exercise of its original jurisdiction. The power of the Court of Appeal to do so is expressly provided for by Section 1146 of the Code.

Now the powers of a single Judge under Section 1150 are confined to matters arising in a matter *pending* before the Court of Appeal, and not involving the decision of the appeal. In my opinion, (and I have on several occasions acted on it previously) an appeal which has not been brought is not a pending cause or matter, when an application for leave to bring an appeal cannot be an application for directions in a cause or matter pending before the Court of Appeal. For this reason I am of opinion that a single Judge has no jurisdiction to enlarge the time for the bringing of an appeal. I agree with the judgments of the other members of the Court.

Solicitors for the Plaintiff—*Braddell Brothers.*

Solicitors for the Defendants—*Allen & Gledhill.*

(*Editorial Note.*—During the hearing of the appeal the Court expressed the view that in such cases the motion for extension of time should be served as early as possible in order to shew the Court how much out of time the motion actually is and to notify the other side.)

[APPELLATE CIVIL JURISDICTION]

S. S. SUBRAMANIAN CHETTIAR

vs.

K. R. P. R. A. L. RENGANATHAN CHETTIAR.

[SINGAPORE CIVIL APPEAL No. 21 of 1932]

Practice—withdrawal of appeal—notice of Registrar—Civil Procedure Code, S. 1131 (1).

A withdrawal of a pending appeal may be effected by giving to the Registrar notice of such withdrawal duly consented to by the respondent or his Solicitors.

A Notice of Appeal was lodged by the Defendant against a Judgment of the Supreme Court in its original civil jurisdiction. The Defendant decided not to proceed with the Appeal and by consent of the Plaintiff lodged a notice of withdrawal of the appeal. The Registrar kept